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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 745

JESSICA S. MAHANA,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

HENRY WOOG,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 745

JESSICA S. MAHANA,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above named Petitioner, Jessica S. Mahana, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled action entered on February 6th, 1950, dismissing her petition for the recovery of income taxes paid by her.

The Court of Claims, upon special findings of fact which were made a part of the judgment, decided as a conclusion of law that the Petitioner was not entitled to recover and her petition was dismissed (R. 52). The opinion of the Court of Claims is not yet officially reported but has been

reported in 88 Fed. Sup. 285, and it appears in full in the record accompanying this petition (R. 45). Plaintiff's motion for a new trial was denied on April 3rd, 1950 (R. 53).

Summary and Short Statement of Matters Involved

The plaintiff had filed claims with the Commissioner of Internal Revenue for refund of income taxes she paid for the years 1943, 1944 and 1945, upon the claim that it was illegal to tax her upon the permanent alimony which she had received in those years; when her claims were denied, she filed suit for the recovery thereof in the Court of Claims which decided against her as above stated. The following is a summary of the transactions pursuant to which the said alimony was paid to the plaintiff, as found by the Court below:

After the plaintiff and her husband had been separated for some time, she sued him for support and maintenance; that suit was settled by the execution of two agreements on November 12th, 1923, as follows: The plaintiff's husband agreed to pay her during her lifetime the sum of $17,500.00 per year by way of and in lieu of alimony and for her support, and for a release of her interest in his property; he secured these payments by a trust agreement under which he deposited securities with the Guaranty Trust Company of New York, which was to pay the net income to the plaintiff for application upon the alimony; the husband also agreed that he would pay any sums required to make good deficits in income, and also agreed to add securities to the trust whenever its net annual income fell below $15,000.00 per annum; on termination of the trust, the corpus was to be transferred to the husband or his estate (Findings 2-5, R. 37-39). These agreements are Exhibits A and B attached to plaintiff's complaint (R. 11, 14).

Shortly thereafter the plaintiff brought suit for an absolute divorce in which she procured a final judgment in her favor in 1924; no mention of said agreement or of alimony or support was made in the complaint or decree in said case (R. 39). The former husband remarried some time later (R. 39).

Plaintiff brought suit in 1929 to determine the rights of the parties under the said agreements, as disputes had arisen as to the administration of the trust and the plaintiff's rights under said agreement; among other things, the plaintiff claimed that either her former husband or the trust should bear the burden of the income taxes on the income from the trust; that litigation was settled by the execution of a further agreement made on June 28, 1933, by which the plaintiff consented to some changes in the agreements made in 1923 and the former husband in return therefor agreed that he would pay the income tax on the plaintiff's alimony if she included the same in her own returns, paid the tax thereon and furnished evidence thereof to him (Findings 8 and 9, R. 39-42). This tax agreement is Exhibit E-3 attached to the complaint (R. 24).

On an application of the plaintiff, the Commissioner of Internal Revenue decided in 1932 that she was not liable for the tax on the alimony under the law as it then stood, so she did not include the same in her own returns until after the passage of the Internal Revenue Act of 1942 (R. 42); the latter, by adding Sections 22(k) and 171(a) to the Internal Revenue Code, specifically purports to require the plaintiff to include the alimony in her taxable income.

Accordingly, the plaintiff included the alimony in her returns of taxable income for 1943, 1944 and 1945, paid the tax thereon and then filed claims for refund (R. 43-44); she claimed

(a) That Congress cannot require her to pay a tax on what is paid to her for permanent alimony and for a release of her rights in her husband's property, as it is not income; and

(b) That even if the statute is constitutional, when properly construed Section 22(k) does not cover the payments made by plaintiff's former husband to make good deficits in income from the trust or to reimburse her for the taxes she had paid on her alimony during the preceding year, because the statute purports to tax only "periodic payments" made pursuant to an agreement which is "incident to such divorce", and made to discharge obligations incurred because of the marital relationship.

The plaintiff's refund claims having been denied, she brought this suit in the Court of Claims.

Statutes Involved

The statutes involved are Sections 22(k) and 171(a) of the Internal Revenue Code and which read as follows:

Section 22-(k):

> "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includable in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includable in the gross income of such husband * * *."

Section 171-a:

> "There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this Section, would be includable in the gross income of her husband, and such income shall not, despite Section 166, Section 167 or any other provision of this Chapter, be includable in the gross income of such husband * * *."

Questions Presented

The questions presented are:

(a) Does Congress have constitutional power under the Sixteenth Amendment or otherwise, to require a divorced woman to pay an income tax upon the payments made to her by her former husband after their divorce for her support and by way of or in lieu of alimony, and in settlement of her rights in his property? This involves the constitutionality of Sections 22(k) and 171(a) which were added to the Internal Revenue Code by the Internal Revenue Act of 1942.

(b) If Congress does have such constitutional authority and said Sections 22(k) and 171(a) of the Internal Revenue Code are valid, then did the Court below properly construe those portions of Section 22(k) which provide that the wife is required to pay a tax only on those payments made to her for alimony which are "periodic payments" and are made pursuant to a written agreement which is "incident to such divorce," and which discharges an obligation arising out of the marital relationship. Accordingly, did the Court below commit error when it held

1. That the contract made in 1923 to settle a then pending suit brought only for support and maintenance was incident to the decree of absolute divorce which the Peti-

tioner obtained later and which made no reference to alimony.

2. That the contract made in 1933 under which the husband agreed to pay the tax on the plaintiff's alimony was incident to the divorce obtained 10 years earlier.

3. That the payments made by the Petitioner's former husband to make good deficits in income from the fund held by the Trustee and available for alimony were "periodic payments."

4. That the payments of additional alimony made by Petitioner's husband to reimburse her for the tax she paid on her alimony during the previous year were "periodic payments" despite the fact that his obligation was dependent upon petitioner's action in including the alimony in her taxable income, paying the tax thereon and furnishing evidence thereof to him.

5. That the last mentioned payments were made to discharge obligations incurred because of the marital relationship—a relationship which had been dissolved ten years before the 1933 agreement was made.

Reasons Relied On for the Allowance of the Writ

The writ prayed for should be allowed for the following reasons:

(a) The decision of the Court below that Congress can require a divorced wife to pay a tax on the sums received by her from or through her former husband for her support and in lieu of alimony and in settlement of her property rights in his estate is, we submit, in conflict with the decisions of this Court in *Gould* v. *Gould,* 245 U. S. 151, and *Douglas* v. *Willcuts,* 296 U. S. 1, which held that alimony is not income to the divorced wife.

The Court below in referring to these cases stated (R. 49) that it would have been compelled to decide this case in favor of the plaintiff, and not against her as it did if it believed that this Court meant what it said in those cases, but concluded that the language of this Court was "not to be taken so literally."

The Court below acknowledged (R. 48) that this Court *did* hold in *Gould* v. *Gould, supra,* that "alimony paid to a divorced wife was not taxable to her as income" and that this Court in that case "used language which indicated that it thought that alimony was not income."

The Court below in its opinion thus clearly indicated that it recognized that the prior decisions of this Court did on their face support the contentions of the plaintiff.

(b) This case involves an important question of Federal law, to wit: the constitutionality of Sections 22(k) and 171(a) of the Internal Revenue Code, which has not been but should be settled by this Court, especially in view of the prior decisions of this Court in *Gould* v. *Gould* and *Douglas* v. *Willcuts, supra.*

(c) This case also involves other questions of Federal Law of great importance in administering the tax laws, which have not been but should be passed upon by this Court, to wit: the correct construction of the words "Periodic payments" and "incident to such divorce," as used in Section 22(k) of the Internal Revenue Code; the construction which the Court below placed upon the words "incident to such divorce" is in apparent conflict with the decisions of the Tax Court of the United States in *Dauwalter* v. *Commissioner,* 9 T. C. 580, *Walsh* v. *Commissioner,* 11 T. C. 1093, and *Du Bane* v. *Commissioner,* 10 T. C. 922, and with the decisions of the Court of Appeals, 2nd Circuit in *Commissioner* v. *Murray,* 174 F. 2d 816, and

of the Court of Appeals, 3rd Circuit, in *Cox* v. *Commissioner*, 176 F. 2d 226, and in *Brightbill* v. *Commissioner*, 178 F. 2d 404, affirming *C. C. H. 8 T. C. M. 112.*

In these cases it was held, in effect, that where an alimony agreement which is made as an incident to a divorce is supplemented or modified by a new agreement made many years later, the latter is not an "incident" to the earlier divorce.

The Court below has held that the tax agreement of June, 1933 was "incident" to the divorce granted ten years earlier and which made no reference to alimony, support or taxes.

(d) Assuming the validity of Section 22(k) of the Internal Revenue Code, the Court below when construing said Section, erred in the conclusions which it drew from the facts found.

The Court below, when considering the meaning of the words "periodic payments" acknowledged that the language of this Section "is somewhat self-contradictory." (R. 50).

The Petitioner contends that the Court below committed the following errors in construing said statute and in arriving at the following conclusions, namely: it erred when it determined:

(1) That the alimony agreement made by the plaintiff pending her suit brought against her husband for support could be deemed an "incident" to the divorce which she obtained later, merely because she filed suit for a divorce about two weeks after the agreement was made, and the agreement provided that it should not be affected by any subsequent divorce of the parties, despite the finding that neither the agreement nor alimony were referred to in the divorce complaint or decree.

(2) That the agreement made by the plaintiff with her former husband ten years after the divorce and by which he, for the first time, agreed to pay the income tax on her alimony was an "incident" to the divorce obtained ten years earlier.

(3) That the payments made by the plaintiff's former husband to reimburse her for the taxes she paid on her alimony were "periodic" payments, despite the fact that there was no obligation to make them unless and until the plaintiff had first included the alimony in her own taxable income and had then paid the taxes thereon and submitted proof of that fact to her former husband.

(4) That the payments last mentioned were made to discharge obligations which arose out of the marital relationship, despite the fact that such relationship had been terminated by the divorce granted ten years before the tax agreement was made.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that Court to certify and send to this Court for review and determination a transcript of the record upon which its said decision was made and that said decision of the Court of Claims may be reversed and judgment directed for the plaintiff as prayed for in her petition to the Court of Claims, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your Petitioner will ever pray, etc.

Dated, April 8th, 1950.

HENRY WOOG,
Attorney for Petitioner,
New York City, N. Y.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court below appears in full at page 45 of the Record and is reported in *88 Fed. Supp. 285.* It has not yet been officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1255, (formerly Section 288 of the Judicial Code).

Statement of the Case

The facts as found by the Court below, and which have been briefly summarized in the petition for certiorari, are as follows:

After the plaintiff and her husband had been separated for about a year, the plaintiff sued him in the Supreme Court of the State of New York for a legal separation and for separate maintenance. This litigation was settled by the execution in November, 1923, of two agreements made as part of one transaction, one between the plaintiff and her husband, and the other between the latter and the Guaranty Trust Company of New York; under the terms of those agreements, the husband agreed to pay to the plaintiff the sum of $17,500.00 per annum "for her separate maintenance and support and by way of or in lieu of alimony." To secure the payment of the alimony, the husband transferred securities to the Trust Company under an agreement by which the latter was to pay the net income to the plaintiff; if there was a deficit in income in any year, the husband agreed to make good the deficit, and if the net income in any year fell below $15,000.00, the husband

agreed to add additional securities to the corpus of the trust; upon the termination of the trust all of the securities would revert to the husband (Findings 2 to 4, R. 37-39). Each released all claims against the property or estate of the other.

Prior to plaintiff's suit for a separation, her husband had been paying her $1,500.00 per month for her support; his income was then running at the rate of $65,000.00 per annum net, after all taxes (Findings 5, R. 39, and 21 at R. 44-45).

On December 1st, 1923, plaintiff brought suit against her husband for an absolute divorce and obtained an interlocutory decree against him on March 7th, 1924, which became final in due course thereafter; no reference is made to alimony or to the plaintiff's support or to the aforesaid agreements either in the divorce complaint or in the divorce decree (Finding 6, R. 39).

Plaintiff's former husband remarried and about 6 months after plaintiff's divorce, her former husband, without her knowledge, transferred to his new wife his reversion or remainder interest in the trust fund, (Finding 7, R. 39).

In 1929 disputes arose between plaintiff and her former husband as to the interpretation and administration of their said agreements (R. 39-40); these disputes involved the question as to who was liable for the tax on the alimony, that is, whether the plaintiff or her former husband or the trustee; other questions involved included the right of the plaintiff and her former husband to terminate the trust without the consent of the second wife or her child, the status of dividends on life insurance which is part of the trust, the right of the plaintiff to demand additional security and the status of certain securities received on the reorganization of a corporation whose securities were held by the Trust Company. Plaintiff brought a suit for a determination of her rights under the agreement; that

litigation was settled by a series of agreements made in June, 1933, (R. 16-24); by these

(a) The husband deposited additional securities with the Trust Company as further security for the plaintiff which were to be held by the Trust Company as Depositary and not as Trustee.

(b) The plaintiff consented to modifications in the trust agreement requested by the former husband, and

(c) The former husband, in consideration for the plaintiff's consent to the foregoing changes, agreed that he would thereafter pay the plaintiff's income taxes on her alimony, provided she had included the same in her own returns, paid the tax thereon and furnished evidence thereof to him, (Findings 8 and 9, R. 39-42, and Exhibit E-3 at R. 24).

During the period that elapsed between 1933 and the passage of the 1942 Revenue Act, the plaintiff did not include the alimony in her individual tax returns because the Commissioner of Internal Revenue had ruled that under the law as it then stood, her husband and not she was liable for the tax in the first instance (R. 42); Congress, by Section 120 of the Internal Revenue Act of 1942, added Sections 22(k) and 171(a) to the Internal Revenue Code and thereby purported to require a divorced wife to pay the tax on her permanent alimony under certain conditions therein enumerated. Thereafter the plaintiff did include her alimony in her taxable income but subsequently filed a refund for the taxes paid thereon, for the years 1943, 1944 and 1945, and those taxes are involved in this suit, (R. 42-44), as her claims for refunds were denied.

The alimony so included by the plaintiff and which is involved in this litigation was paid to the plaintiff as follows: Some of it represents the income from the se-

curities held by the Guaranty Trust Company; some of it is derived from sums paid by the former husband to make good deficits in income and paid over by the Trustee to the plaintiff as part of her guaranteed alimony of $17,500.00 per annum; the third portion of the alimony so included consisted of the sums which the former husband had paid to the plaintiff direct as additional alimony to reimburse her for the income taxes she had paid on her alimony during the previous year (R. 42).

The plaintiff filed claims for refund of the taxes paid upon the said alimony payments upon the grounds,

(a) That Congress has no constitutional power to require a wife to pay a tax on her alimony, as alimony is not income but an allowance made for the wife's support out of the husband's property, and is in effect a division of property rights, and

(b) Even if the statute is constitutional when properly construed, it did not cover the payments made by plaintiff's former husband to make good deficits in income from the trust or to reimburse her for the taxes she had paid on her alimony during the preceding year, because the statute purports to tax only periodic payments made pursuant to an agreement which is incident to the divorce (R. 44).

Errors Assigned

(1) The Court below should have held that Sections 22(k) and 171(a) of the Internal Revenue Code are unconstitutional, and that Congress cannot require a divorced wife to pay an income tax on what is paid to her as permanent alimony and for her support and for a release of her rights in the property of her former husband.

(2) It was error for the Court below to hold

(a) That the contract which the plaintiff made with her husband in November, 1923, was incident to the divorce which she later obtained from him.

(b) That the contract which the plaintiff made with her former husband in June, 1933, by which he agreed to pay her, on conditions therein specified, the income taxes she paid on her alimony was "incident" to the divorce she had obtained ten years earlier.

(c) That the payments made by the plaintiff's former husband to make good deficits in the income from the alimony trust, were "periodic payments."

(d) That the payments made by the plaintiff's former husband to reimburse her for the taxes she had paid on her alimony were "periodic payments."

(e) That the payments made under the tax agreement of June 28, 1933, were made to discharge legal obligations incurred by the former husband because of a marital relationship—a relationship which had terminated ten years before the agreement was made.

(f) That the plaintiff was required to include in her taxable income all sums she received under either agreement of November 12, 1923, or under any of the agreements of June 28, 1933.

Argument

I.

The Decision of the Court Below—That Alimony Is Taxable Income of the Wife—Is in Direct Conflict with the Decisions of This Court in Gould v. *Gould, 245 U. S. 151 and Douglas* v. *Willcuts, 296 U. S. 1*

In *Gould* v. *Gould* 245 U. S. 151, this Court held that a divorced wife could not be required to pay a tax on her alimony because it did not constitute income to her.

In *Douglas* v. *Willcuts*, 296 U. S. 1, this Court extended this principle to include the income which the former wife received from property which her former husband had placed in trust, as security for and not in discharge of the alimony which he had agreed to pay.

It is Petitioner's contention that the attempt which Congress made by Section 120 of the Internal Revenue Act of 1942 (now Sections 22(k) and 171(a) of the Internal Revenue Code) to shift the income tax on alimony from the husband to the wife, is in violation of the Constitution and that Congress cannot, by its fiat, make income that which this Court in the cases just cited had held is not in fact income.

The Court below recognized (R. 48) that this Court did, in the *Gould* case, hold that "alimony was not income," but attempts to distinguish that case by saying that this Court was then construing the 1913 Income Tax Act and not the Sixteenth Amendment.

Then when we pointed out below that this was immaterial because this Court in the *Douglas* and other cases had said that Congress in defining gross income in the various income tax acts had manifested its intention to use to the fullest extent the power granted to it by the Sixteenth Amendment, the Court below said: (R. 49)

> "If we take these expressions literally, then Gould v. Gould, supra, would have to be regarded as a decision that alimony could not be taxed because it was not income in the sense of the Sixteenth Amendment."

After having agreed with petitioner's position to this extent, the Court below then added:

> "But we think that even the Supreme Court should not be taken so literally when the consequence would be to nullify an act of Congress, the intention of which is clear."

We submit, however, that there is nothing at all ambiguous or doubtful in the language used by Mr. Chief Justice Hughes when he said in the *Douglas* case at page 8 of 296 U. S.:

> "Amounts paid to the divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree."

It will be noted that the Chief Justice did not say that the alimony is not subject to tax because of the language of the statute, but because of the nature of the payment itself, namely, that it was made to discharge the obligation to support and was not regarded as income of the wife.

It is clear that the Federal Courts have not considered that the decisions in the *Gould* case or in the *Douglas* case involved purely a question of statutory construction and not a question of the nature of alimony; thus in *Hopkins* v. *Comm.*, 144 F. 2d 683 (C. C. A. 6), cert. den. 331 U. S. 838, the Court said at 690:

> "In the case of *Gould v. Gould,* 245 U. S. 151, the Supreme Court decided that the net income of a divorced husband, subject to taxation, was not decreased by the payment of alimony by a court judgment and on the other hand, the sum received by the wife on account thereof did not give rise to income to her. *The basis of the decision was that the divorced wife was not a separate taxpayer from her former husband.* In the case of *Douglas v. Willcuts, supra,* the Supreme Court had before it the question whether the income of a trust set up by a husband in connection with a divorce decree for the support and maintenance of his wife was taxable to the settlor. In that case the Supreme Court held the trust income taxable to the settlor. The court in extending the rule in the *Gould* case, stated the Douglas trust was created 'as the channel for the application of the income to the discharge' of the hus-

band's obligation *and left the nature of the transaction unaltered* * * *." (Italics ours.)

In *Buchanan* v. *United States,* 164 F. 2d 710, the Court held that interest received by a wife on notes given by her former husband for alimony did not constitute income to her, and said at 712:

> "In the cases named the court was dealing with trusts established by husbands pursuant to separation agreements approved by decrees of divorce courts. But the rule was settled by *Douglas v. Willcuts, supra,* that income from such a trust was basically alimony and as such not income to the wife under *Gould v. Gould.* * * * We do not think that the translation of an alimony obligation into negotiable promissory notes can change the essential nature of the obligation for income tax purposes, any more than the translation of that obligation into a simple contract obligation or into a trust could change its essential nature."

It is therefore submitted that this Court should review the action of the Court below in determining the effect to be given to the language used by this Court in the *Gould* and *Douglas* cases.

II

This Court Should Settle the Question of the Constitutionality of Sections 22(k) and 171(a) of the Internal Revenue Code; it Has Not Heretofore Been Presented to This Court

In its brief in the Court below, counsel for the Government contended that this is the first case in which a taxpayer has asserted the invalidity of the tax on alimony. We find, however, that the same question was presented to the United States Tax Court, but was not considered because not

properly raised, in *Muriel Dodge Neeman v. Comm.*, 13 T. C. 397; in this case Judge Murdock said:

> "The petitioner in her brief attempts to raise the important question of whether the payments (alimony) could be taxable to the petitioner under the Sixteenth and Fifth Amendments to the Constitution."

It is submitted that this question is one that should be determined and set at rest, especially in view of what the Court below said about the decisions of this Court in the *Gould* and *Douglas* cases, *supra.*

In arriving at its conclusion that Congress may tax alimony as income to the wife, the Court below said at R. 49:

> "A large sum of money comes into the plaintiff's hands. One wonders why it is not also income in the sense of the Sixteenth Amendment. It is income to spend, to live on, to save."

This argument, however, begs the very question which the Court was called upon to decide; that is, was it in law "*income* to spend, etc." We contend it was not income at all, but merely the sum allocated to the plaintiff as that portion of her husband's means which they considered necessary for her support; or, as the Courts have pointed out, the specification of the extent of the husband's duty to support.

As was said in *Commissioner of Corporations & Taxes* v. *Dalton,* 304 Mass. 147, at 152:

> "The peculiar and personal nature of payments made for the support of a wife does not readily lend itself to any correct definition of income."

The Court below seems to have confused "income" with "receipts." These words are not synonymous.

Von Baumbach v. *Sargent Land Co.*, 219 Fed. 31, at 36; *Southern Pac. Co.* v. *Lowe*, 247 U. S. 330.

In the case last cited, this Court said:

> "We must reject . . . the broad contention, submitted on behalf of the Government, that all receipts—everything that comes in—are income within the proper definition of the term gross income. . . ."

This Court in *Audubon* v. *Shufeldt*, 181 U. S. 575, said at 577:

> "Alimony does not arise from any business transaction but from the relation of marriage."

Under both New York and Federal Law, alimony, whether payable by decree or contract, is not subject to seizure by the wife's creditors.

Glasser v. *Rogers*, 53 Fed. Supp. 668;
Maurice Baskin & Co., Inc. v. *Howe*, 225 N. Y. App. Div. 553;
Romaine v. *Chauncey*, 129 N. Y. 566.

In the matter of *Mary A. Spencer*, 20 B. T. A. 58, the Board of Tax Appeals rejected the contention of the Commissioner that the former wife was taxable on her alimony because it was payable to her as the beneficiary of an alimony trust and not as the result of a court decree, and said at 68:

> "We can see no distinction, in so far as petitioner's tax liability is concerned in whether the payments made her represented alimony specifically awarded by the court, or amounts agreed upon by her husband in lieu of alimony. * * * To the extent that the payments received in the taxable years by petitioner represent sums in lieu of alimony, we hold they do not represent income to petitioner."

And at page 67 the Board said in that case that the husband was in effect using the trust income to satisfy his own obligations; thus:

> "Were such the case, any taxpayer could convey his property in trust, the income to be distributed to his creditors in settlement of his debts, and thus while his debts were being paid, escape tax upon his income while devoting it in this way to his own purposes, and his creditors would be taxed with the receipt of income as beneficiaries of a trust, when in fact they had received merely payment of debts which might represent no income whatsoever."

This is what Chief Justice Hughes referred to in *Douglas* v. *Willcuts, supra,* as using a trust to "channel" the income therefrom to the discharge of the husband's obligations.

(It is to be noted that the decision in the case of *Mary A. Spencer* was acquiesced in by the Commissioner in C. B. IX-2, 56).

Periodic receipts—even when received regularly—are not necessarily income. Directly in point is the case of *Buck* v. *McLaughlin,* 48 Fed. (2d) 135; that case involved the taxability to a widow of the family allowance paid to her out of the estate of her deceased husband; in holding that it was not income to her the court said at 136:

> "We are unable to distinguish the case at bar in principle from the situation in Gould v. Gould, supra. A family allowance to the widow from the assets of her husband for her support, pending the administration of his estate after the dissolution of the marital community by the death of the husband is not dissimilar in principle from alimony allowed to her from his estate or earnings after the dissolution of the marital community by divorce.—Under these decisions it is clear, we think, that the payment to the

widow is not income within the meaning of that term as used in the Constitution and in the laws of Congress as interpreted by our Supreme Court."

It is again clear from this case that the Federal Court believed that this Court had, in the *Gould* case, determined the taxability of alimony under the Sixteenth Amendment.

This court should therefore construe these new Sections 22(k) and 171(a) in the light of the authorities above cited, and passed upon their validity.

III.

The Construction of the Words "Incident to Such Divorce" and "Periodic Payments" As Used in Section 22(k) of the Internal Revenue Code (Which Section Was Added in 1942) Has Not Yet Been Passed Upon by This Court, and the Construction Adopted by the Court Below Is in Apparent Conflict with Decisions of the Tax Court of the United States and of the Court of Appeals, in the Second and Third Circuits.

Section 22(k) relates only to alimony which is not paid through a trust; as we have shown in our statement of facts, all of plaintiff's alimony did not come from the trust; (a) part of it was paid by the former husband to make good deficits in trust income; (b) part of it was paid by him direct to the plaintiff to compensate her for the taxes she had paid on her alimony in the preceding year.

Non-trust payments are taxable, if at all, only under Section 22(k) of the Internal Revenue Code. That Section however, does not tax *all* alimony to the wife; it is taxable to her only if

(a) The payments are "periodic—whether or not made at regular intervals."

(b) The payments must be made either pursuant to a court decree or to an agreement "incident to such divorce."

(c) The payments must be made to discharge obligations incurred by the husband because of the marital relationship.

That the proper construction of these conditions is important to the administration of the Federal Tax Laws is shown by the frequency in which they—(at least conditions b and c)—have been before the Courts in the short time that has elapsed since this Section was first added in 1942:

Thus, the proper construction of the words "incident to such divorce" was directly involved in

Brightbill v. *Commissioner,* 178 F. 2d 404, Aff'g CCH 8 T. C. M. 112;
Cox v. *Commissioner,* 176 F. 2d 226;
Commissioner v. *Murray,* 174 F. 2d 816;
Daine v. *Commissioner,* 168 F. 2d 449;
Smith v. *Commissioner,* 168 F. 2d 446;
Brown v. *Commissioner,* 7 T. C. 715;
Brady v. *Commissioner,* 10 T. C. 1192;
Dauwalter v. *Commissioner,* 9 T. C. 580;
DuBane v. *Commissioner,* 10 T. C. 922;
Fry v. *Commissioner,* 13 T. C. 658;
Johnson v. *Commissioner,* 10 T. C. 647;
Myerson v. *Commissioner,* 10 T. C. 729;
Neeman v. *Commissioner,* 13 T. C. 397;
Van Vlaanderen v. *Commissioner,* 10 T. C. 706, Aff'd 175 F. 2d 387;
Walsh v. *Commissioner,* 11 T. C. 1093.

And the proper construction of the requirement that the payments discharge an obligation which the husband incur-

red because of the marital relationship was also considered in the *Dauwalter, DuBane* and *Daine* cases, *supra.*

The decision of the Court below, in holding that the payments which the former husband made to the plaintiff to compensate her for the taxes she paid on her alimony despite the fact that there was no such requirement imposed upon him until 1933—ten years after the divorce, and after all obligations resulting from the marital relationship had terminated with the divorce (the decree made no reference to alimony) is plainly contrary to what the Tax Court said, for instance, in the *Walsh* case, 11 T. C. 1093.

That was a case where the husband and wife signed an agreement in 1927 by which the husband agreed to make periodic payments for the support of his wife. They were divorced by a decree made 18 months later which made no mention of this agreement. In 1941 the wife sued for arrears, and the children, at the husband's instigation, sued the wife. This litigation was settled by a new agreement in 1941, which purported to rescind the original agreement and reduced the amount of the alimony; the new agreement contained other provisions relating to the husband, the wife, and their children. It was held that the wife was *not* required to include the payments of alimony made at the reduced rate under the 1941 agreement in her tax returns; the Tax Court said at 1095:

> "It was held in *Frederick S. Dauwalter,* 9 T. C. 580, and *Benjamin B. Cox,* 10 T. C. 955, 959, that the word 'incident' in section 22-(k) refers to the decree of divorce and the written agreement in question must be incident to the divorce decree itself. *Obviously, the agreement of November 13, 1941, was not incident to the decrees of divorce entered about fourteen years previously* and, therefore, following the two cases cited, it is held that the payments in question were not taxable to the petitioner under section 22-(k)." (Italics ours.)

In the *Murray* case *supra,* the Court of Appeals, Second Circuit, held that where the former husband and wife made a contract which changed the provisions of an earlier agreement which they had made as incident to their divorce, the second agreement was not of itself an incident to the divorce.

In the *Dauwalter* case, *supra,* the Court said at 585:

> "Since the entry of the decree in 1935 destroyed the marital relationship, the divorced wife had no claim for support in 1939 against the petitioner because of any marital relationship except under the original agreement. The additional payments were made, not in discharge of a legal obligation arising out of a marital relationship, but upon the request of one who had at the time no legal rights or claim thereto."

And the *Cox* case, *supra,* involved a situation where a husband who had obtained a divorce which the wife claimed was invalid, made an agreement with her about 8 months later by which he agreed to pay alimony to her and she agreed not to contest the divorce so long as he made the alimony payments. The Court of Appeals, Third Circuit, held that these payments did not constitute alimony within Section 22-k because the agreement was not made "incident" to the divorce, and the divorce had already terminated the marital obligations of the husband.

It is submitted, that the Court below, in ignoring all of these authorities—no precedent was cited by the Court below in this part of its opinion—has created an uncertainty in the application of the language of Section 22-(k) which should be resolved by this Court.

IV

The Court Below, in Construing Section 22-(k) Erred in the Conclusions Which it Drew from the Facts Found

This Court, when reviewing a judgment of the Court of Claims, is authorized by Section 1255 of Title 28 of the United States Code, to review the conclusions which that Court found from its own Special Findings of Fact.

U. S. v. *Esnault-Pelterie*, 303 U. S. 26 at 31.

For the purpose of the present application, we point out the following conclusions of the Court below which we contend are not justified by the Findings of Fact.

(The following points relate only to the payments made by the former husband to make good deficits in trust income and to compensate the plaintiff for taxes she paid on her alimony).

1. The conclusion that the agreement of 1923 was an incident to the divorce granted plaintiff later is inconsistent with Findings 2 and 3 (R. 37-38) that it was made to settle a suit for separation and support (and not for a divorce) and with Finding 6 (R. 39) that no mention of the agreement, or of alimony or support was made either in the divorce complaint or in the divorce decree.

2. The conclusion that the agreement made on June 28, 1933 by which the former husband for the first time agreed to pay the tax on plaintiff's alimony, is "incident" to the divorce granted ten years earlier is contrary to

(a) The express terms of the 1923 agreement—Exhibits A and B attached to plaintiff's complaint, R. 11 and 14, and which are covered by Findings 3 and 4, R. 37-38; the tax on alimony is not referred to therein;

(b) Finding 6, R. 39, which found that alimony was not mentioned in the divorce complaint or decree, and that

the divorce antedated the tax agreement by almost ten years;

(c) The language of the tax agreement (Ex. E-3 at R. 24) which expressly recites that the tax agreement was made in return for plaintiff's consent to modify the 1923 agreement in other particulars, and the Finding 9 at R. 41, that the tax agreement was made to settle the then pending litigation between the parties.

The tax agreement (Exhibit E-3 attached to the complaint, R. 24) expressly recites that it was made by the former husband in consideration for the plaintiff's consent to modify the 1923 agreement as he requested; he was getting very substantial concessions for his tax agreement; in addition to changes in the administrative provisions of the trust, the plaintiff's consent that the additional securities he put up should stay out of the trust was a very substantial benefit to the husband; if they had gone into the trust, then on plaintiff's death they would pass to his second wife and her child because he had assigned to them all his interest in the trust by the assignment he made in 1924 (Finding 7, R. 39); the 1933 deposit agreement, however, provided that on plaintiff's death the securities would revert to the husband and not to his wife and child, and he personally would receive the excess income during the trust period.

Therefore, this 1933 tax agreement could not have been an incident to the divorce decree of 1923; it was made to settle the 1931 litigation which had nothing to do with the marital relation already dissolved for many years.

See:

Commissioner v. *Murray*, 174 F. 2d 816;
Van Vlaanderen v. *Commissioner*, 10 T.C. 706, aff'd. 175 F. 2d 389;
Dauwalter v. *Commissioner*, 9 T. C. 580.

3. The conclusion that the payments under the 1933 tax agreement were periodic is contradicted by the provisions of the agreement (R. 24) which show that they were conditional and uncertain, and by Finding 10, R. 42, that for 9 years after the agreement was made no such payments were made—or were required.

The Court below acknowledged (R. 50) that the language of the statute—"periodic payments (whether or not made at regular intervals)—" was "somewhat self contradictory."

These payments were not made at "stated" or "fixed" times at all; they were characterized not by periods of time, but by events or conditions.

See Webster's New International Dictionary under "periodic."

In *Pappenheimer* v. *Allen,* 71 Fed. Supp. 788, aff'd. 164 F. 2d 428, the court said:—

> "I think 'periodic payments' within the meaning of 23(u) and 22(k) are specific cash payments required of the husband under the court's decree or separation agreement."

4. The conclusion that these tax payments were made to discharge an obligation incurred by the former husband because of the marital relationship—the language of Section 22(k) of the Internal Revenue Code—is contradicted by Finding 6, R. 39, that he was divorced by a decree which made no mention of any alimony or support.

The marital relationship having been terminated in 1923, it could not be used in 1933 to support an obligation to pay additional sums. When plaintiff's former husband agreed in 1933 to add to plaintiff's alimony enough to enable her to pay her taxes thereon (R. 24), he did not do so in recognition of his obligation to support, but because he wanted the plaintiff's consent to changes in his original agreement; as he put

it in his agreement—R. 24—"in consideration for your acceptance of that (*i.e.*, my) proposal—."

As was said in the *Dauwalter* case, *supra*, at 585:

> "Since the entry of the decree in 1935 destroyed the marital relationship, the divorced wife had no claim for support in 1939 against the petitioner because of any marital relationship *except under the original agreement.*" (Italics ours.)

Conclusion

In view of the fact that the validity of Sections 22(k) and 171(a) of the Internal Revenue Code—added by Revenue Act of 1942—has not yet been passed upon by this Court, and that the decision of the Court below in upholding their validity is in apparent conflict with decisions of this Court, and in view also of the public importance in the administration of the Income Tax Laws of a determination by this Court of the proper construction of the various conditions and limitations of said Section 22(k), it is respectfully submitted that the petition for certiorari should be granted.

Dated, New York City, April 7th, 1950.

Respectfully submitted,

HENRY WOOG,
Attorney for Petitioner,
160 Broadway,
New York City, N. Y.